

THE ROMAN CONTRACT ACCORDING TO LABEO

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The eminent Roman jurist Labeo describes the contract of Roman law as being *ultrocitroque obligatio quod Graeci synallagma vocant*.¹ In conjunction herewith it is helpful to consult a passage from Justinian's *Digest* of which a translation is as follows: "If there is a *causa* then, according to Ariosto's well-expressed reply to Celsus, there is an obligation formed. For example, I have given you a thing on the understanding that you should give me another, or I have given you something that you should do something . . . , this, says Ariosto, amounts to a *synallagma*, i. e. a contract, and a civil obligation arises from it."² The characteristic feature of a contract was thus that an obligation to do or to give something was called into being on the part of each of the parties to the contract. An obligation on one side implies a corresponding right on the other side, and thus mutual rights as well as mutual obligations were created. The feature of mutuality was that which distinguished a contract from a donation for, of course, in the case of the latter no obligation of any sort ensued on the part of at least the donee.

It has sometimes been thought and said that in Roman law no consideration was required for the validity of a contract. It is difficult to conceive how such an idea could ever have arisen in the face of Labeo's language cited above. For with the necessity of mutuality of performance the promised or executed performance by way of giving or doing on the one side was the required consideration for the giving or doing on the other side. Mutual performance, promised or accomplished, on the one side, was thus what created the validity of an agreement as a contract; the valid contract again created obligation. A contract may thus be described in terms of either its origin or its effect. It may thus be regarded either as an agreement of parties which is supported by a giving or doing on either side or as an agreement of parties from which ensues an obligation of giving or doing on either side. English lawyers, as a rule, deal with the matter of contract in the former aspect; Labeo deals with it in the latter aspect. Labeo's treatment of the matter appears to be the preferable one, for it avoids departure from correct principle more effectively than the other method of dealing with the matter does. The several titles of Justinian's *Digest* treating of *causa* show, however, that this other method had not been lost sight of. For

¹ *Digest*, 50. 16. 19.

² *Digest*, 2. 14. 7, sec. 2.

causa is that which has been promised to be given or done or has been given or done (*causa data*) by a party to an agreement with a view to something being given or done by the other party. *Causa* in its essential features was thus but the English *consideration*.

It is interesting to note certain differences in the application of the principle of *causa* or consideration between Roman and English law. A gratuitous promise by one person to lend an article to another for a certain time was as little a valid contract in Roman as in English law, for the other incurred no obligation in consequence of such a promise, and consequently there was no mutuality of performance. But as soon as delivery had been made of the promised article and the promisor had thus divested himself of the possession of the article an obligation arose on the part of the other to deliver the article back at the appointed time. The right of the lender to claim back the article at such time after he had once divested himself of its possession was of beneficial interest to him. It is apparent thus that with the delivery of the article by the lender mutual rights and obligations ensued, as required by Labeo. This condition of things is apparently lost sight of by English lawyers, according to whom the article could be claimed back at any time by the lender. In point of correctness of principle and also of equity it would seem that preference must be given to the practical application of the principle enunciated by Labeo in comparison with the practical application of the principle of consideration in English law.

The main difficulty in connection with Labeo's description of contract has been the contract of *mandatum*. But regarding the matter from a historical point of view it seems probable that originally the subject of a contract of this kind was always a tangible article and that delivery of the article was contemporaneous with the inception of the contract, as in the case of the lending of an article by one person to another. This seems to be implied by the word *mandatum* itself, which is derived from *manus* and *dare*. A mere promise to accept a *mandatum* was not binding just as a mere promise to lend was ineffective, but the *mandatum* having been accepted, as in the case of a thing lent for use, the contract was binding on both sides and consequently the mandatory became liable not only for malfeasance but also for nonfeasance. In course of time it became possible, and perhaps usual, to allow the mandatory a fee or reward of some sort without the transaction becoming the less honorific contract of hiring of services.

The principle of *consideration* was carried further in Roman than in English law. Thus with the application of the principle of *laesio enormis* a contract of purchase and sale was voidable where the price given was inadequate. There are post-Roman

commentators who hold that the principle of *laesio enormis* was in Roman law applicable also to all other contracts besides that of purchase and sale, excepting that of compromise of suit (*transactio*). By an obligation was of course meant a real and substantial one, so that a "peppercorn consideration" would certainly not have been held sufficient to sustain the validity of a contract.

Also, even without a special agreement an obligation could arise *quasi ex contractu*, where, for instance, expenses had been incurred by a person on behalf of another without special authorization by the other under circumstances which rendered it equitable that his expenses should be recouped to him. In general the principle applicable to the various transactions of mankind apart from donation was: *bono et aequo non conveniat . . . lucrari aliquem cum damno alterius aut damnum sentire per alterius lucrum*.³

As an example of the practical application of the principle of *consideration* in the Roman law of contract the following case, taken from Justinian's *Digest* may be given. Where an agreement was entered into between the owner of a fugitive slave and another person by which the owner was to pay the other a certain amount should the other capture and deliver to the owner the fugitive slave, this agreement was declared to constitute a valid contract for the reason assigned that it comprised a bargain of some sort (*habet in se negotium aliquod*).⁴ The bargain thus, involving a *quid pro quo*, was the determining factor in the agreement establishing obligation.

An interesting case illustrative of the meaning of the word *causa* in the Roman law of contract is that of compromise of suit (*transactio*). There the concrete advantage which each of the parties to the contract enjoyed was that each was thereby freed from the danger and trouble of litigation. *Si lis fuit, hoc ipsum, quod a lite disceditur, causa videtur esse*.⁵ Of course if there was a genuine dispute each of the parties surrendered some portion of that to which he conceived himself to be entitled. *Transactio nullo dato, vel retento, seu promisso minime procedit*.⁶ It is this that distinguished the contract from a donation. *Qui transigit re dubia et lite incerta . . . transigit. Qui vero paciscitur donationis causa rem certam et indubitatam liberalitate remittit*.⁷ An instance of the liberality here referred to is where a person enters into an agreement with another to forego a portion of an acknowledged claim against the other, and such

³ *Digest*, 23. 3. 6, sec. 2.

⁴ *Digest*, 19. 5. 15. The word *negotium* is frequently used in the *Digest* in the sense of a permutative agreement.

⁵ *Digest*, 12. 6. 65, sec. 1.

⁶ *Code*, 2. 4. 38.

⁷ *Digest*, 2. 15. 1. *Causa* in the ablative here is used in a sense different from that in which the word is used as signifying consideration.

an agreement was perfectly valid, amounting, as it did, in part to a gift, which the other accepted as such.

Labeo's statement affords us a true test by which to judge whether a certain transaction is a contract or not. Without such a test it would be difficult to establish a dividing line between what is a contract and what is not.